

LAW REVIEW¹ 19051

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The Federal Circuit Reverses the MSPB yet again

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1.1.1.8—USERRA applies to the Federal Government

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Sharpe v. Department of Justice, 916 F.3d 1376 (Fed. Cir. 2019).

Kevin Sharpe has been employed by the Drug Enforcement Agency (DEA), a component of the United States Department of Justice (DOJ), since 1995. At the time he began his career as a DEA agent, he was a Navy Reservist, and he continued to serve in the Navy Reserve until he retired from that Reserve Component in 2008. While employed by DEA, he was deployed three times

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

by the Navy Reserve, for three weeks in 1998, for six months in 2003, and again for six months in 2006, in addition to drill weekends and other reserve training.

In 2007, DEA transferred Sharpe from the Los Angeles Field Division to the San Diego Field Division. Sharpe is a GS-13 DEA agent. Between 2012 and 2015, he applied for 14 GS-14 positions but was not selected for any of them. In this case, Sharpe contended that the DEA's failure to promote him violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA). That section provides as follows:

- (a)** A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, *promotion*, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
- (b)** An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in *the* uniformed services.
- (c)** An employer shall be considered to have engaged in actions prohibited--
 - (1)** under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a *motivating factor in the employer's action*, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
 - (2)** under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a *motivating factor in the employer's action*, unless the employer can *prove* that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
- (d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.³

³ 38 U.S.C. 4311 (emphasis supplied).

To prevail in his USERRA case against the DEA, Sharpe must prove that his employer's annoyance with him because of his Navy Reserve service, and the absences from his civilian job necessitated by that service, were *a motivating factor* in the employer's decision to deny him promotion from GS-13 to GS-14. He is not required to prove that annoyance with him because of his service was the sole reason for the non-promotion. If he proves motivating factor, the *burden of proof shifts to the employer* to prove that he would not have been promoted even if he had not been a Navy Reserve member.⁴

The pertinent section of the Department of Labor (DOL) USERRA regulation is as follows:

Who has the burden of proving discrimination or retaliation in violation of USERRA?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.⁵

USERRA cases against federal executive agencies, as employers, are litigated in the Merit Systems Protection Board (MSPB).⁶ The MSPB is a quasi-judicial agency in the Executive Branch of the Federal Government. It was created by the Civil Service Reform Act of 1978 (CSRA). That statute divided the former Civil Service Commission (CSC) into three successor agencies.

The Office of Personnel Management (OPM) inherited the CSC's headquarters building at 1901 E Street Northwest in Washington and most of the staff and resources and the functions as the personnel office for the Executive Branch. The MSPB inherited the adjudicatory functions of the former CSC. OSC inherited the investigatory and prosecutive functions. USERRA (enacted in 1994) did not create the MSPB, but section 4324 of USERRA gave the MSPB important new responsibilities and jurisdiction.

The MSPB consists of a Chairman and a Vice Chairman, who are to be of the President's political party, and a Member, who is to be of the other major party. President Trump nominated a Chairman, a Vice Chairman, and a Member. Each member must be appointed by the President and confirmed by the Senate, and each member serves for a five-year term. If a member's term expires and the replacement has not yet been nominated and confirmed, the member can serve an "overtime period" of up to an additional year, or until the new member is confirmed, whichever comes first. The MSPB's website states:

⁴ 38 U.S.C. 4311(c)(1).

⁵ 20 C.F.R. 1002.22 (bold question in original).

⁶ 38 U.S.C. 4324. Cases against state and local governments and private employers are litigated in the federal district courts. 38 U.S.C. 4323.

The Board currently has no sitting members. Prior to March 1, 2019, the Board operated for over two years without a quorum. Board members Anne M. Wagner and Susan Tsui Grundman left on March 1, 2015, and January 6, 2017, respectively. Board Member Mark A. Robbins, who served most recently as Vice Chairman of the Board, served as the sole Board member from January 7, 2017, through February 28, 2019, when his statutory term ended. ...

As to the adjudicatory authorities of the Board, because there are no Board members, the Board is unable to issue final decisions on petitions for review. *See generally* 5 U.S.C. 1204(a) and 5 C.F.R. 1200.3.

Deciding a case requires a quorum of at least two duly appointed and confirmed Board members, and there has not been a quorum since January 7, 2017. All the petitions for review that were pending on that date, and all the new petitions for review that have been added since that date, are still pending, and the backlog amounts to more than 2,000 cases. When a quorum next exists, all the pending cases will likely have to be decided before any new cases can be addressed.

In the meantime, the MSPB's Administrative Judges (AJs)⁷ continue to hear and decide MSPB cases, including USERRA cases. The party who loses at the AJ level can appeal to the MSPB itself, within 35 days after the AJ's decision is announced. If neither party appeals to the MSPB itself within 35 days, the decision of the AJ becomes the final decision of the Board. If either party appeals to the MSPB, the case goes into deep limbo, probably for years.

If the individual complainant loses at the AJ level, he or she can wait 35 days for the AJ's decision to become final and then appeal to the Federal Circuit. If the complainant wins at the AJ level and the agency appeals, the case goes into deep limbo. Thus, in a way, it is better for the complainant to lose instead of win at the AJ level, until a quorum is restored.

Sharpe's USERRA case against DOJ was referred to Tamara Ribas, an AJ of the MSPB. In accordance with standard MSPB practice, she conducted a hearing and then made findings of fact and conclusions of law. After ruling against Sharpe on key evidentiary issues and preventing his counsel from presenting probative evidence of discrimination based on animus against him for his Navy Reserve membership and activities, AJ Ribas ruled against him, finding that the DEA's failure to promote him was not motivated by his membership and service in the Navy Reserve.⁸

⁷ All MSPB cases, including USERRA cases, start before an AJ. The AJ conducts a hearing and makes findings of fact and conclusions of law. The AJ's decision becomes the decision of the Board if neither party appeals to the Board within 35 days after the AJ's decision is announced.

⁸ *Sharpe v. Department of Justice*, 2017 MSPB LEXIS 1866 (April 24, 2017).

Because the MSPB has not had a quorum of at least two members since January 2017, Sharpe's counsel wisely chose to wait 35 days, to allow the AJ's decision to become the final decision of the MSPB, and then appealed to the United States Court of Appeals for the Federal Circuit.

The Federal Circuit is a specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions. As is standard practice in the federal appellate courts, Sharpe's appeal was assigned to a panel of three appellate judges: Kimberly Ann Moore, Richard G. Taranto, and Raymond T. Chen. Judge Moore wrote the decision, and Judges Taranto and Chen joined in a unanimous panel decision.

Sharpe was transferred from the Los Angeles Field Division to the San Diego Field Division ("SDFD") in 2007. Aside from a temporary promotion to a GS-14 position in 2012, he has served in a GS-13 position since 2001. As of 2015, Sharpe has applied for fourteen GS-14 positions since 2012, but he has never been selected for promotion.

Since 2009, Sharpe has been supervised by William Sherman, who served first as an Assistant Special Agent in Charge ("ASAIC") and later as Special Agent in Charge ("SAIC") of the SDFD. As SAIC, Sherman was and is responsible for recommending agents for promotion to GS-14 positions. For each GS-14 position, SAIC Sherman selects and ranks three agents from a Best Qualified List ("BQL") composed of agents with qualifying scores on the Special Agent Promotion Program ("SAPP") examination. Because he scored 91 out of 100 on his SAPP examination, Sharpe was on the BQL for every GS-14 position for which he applied, but he was only selected by SAIC Sherman three times and was never SAIC Sherman's first-ranked agent. Based on SAIC Sherman's recommendation, a Career Board selects an agent for promotion. The Career Board often selects SAIC Sherman's first-ranked agent, absent an agent requiring a lateral transfer from abroad or for hardship.

In 2015, Mr. Sharpe requested corrective action under USERRA, asserting his non-selection for the fourteen GS-14 positions was motivated by his military status as a reservist. He alleged that the Career Board had discriminated against him through its reliance on the recommendations of SAIC Sherman, whom Mr. Sharpe alleged was hostile towards reservists.

At that time, six other current and former reservists working as agents in the SDFD had also filed USERRA claims. Three of these claims named SAIC Sherman, including that filed by reservist Andrew Sorrells. Mr. Sorrells, like Sharpe, worked under SAIC Sherman.

Before the MSPB AJ, Mr. Sharpe sought to introduce as evidence of SAIC Sherman's hostility towards reservists an email sent to Mr. Sorrells by ASAIC Stephen Tomaski shortly after Mr. Sorrells' USERRA claim was filed. ASAIC Tomaski reported directly to SAIC Sherman and was two levels above Mr. Sorrells in the SDFD, though not in Mr. Sorrells' direct supervisory chain. In

making recommendations regarding promotions to the Career Board, SAIC Sherman allowed ASIACs, including ASAIC Tomaski, to "weigh in." The email had the subject line "You are a coward..." and stated, in full, "I do not know how to phrase it any other way.. [sic] Do NOT ever contact me again." ASAIC Tomaski copied SAIC Sherman on the email.

Before Sharpe's hearing, the government objected to the Tomaski email based on relevance, and the MSPB AJ excluded it, determining "it is not relevant in [Mr. Sharpe's] case." At the hearing, Sharpe sought to question SAIC Sherman about any hostility he had towards Sharpe's reservist status or the reservist status of others in the SDFD. Only general questioning was permitted, for example, whether SAIC Sherman's decision not to recommend Mr. Sharpe for certain GS-14 positions "ha[d] anything to do with his former military reservist status" and whether SAIC Sherman "consider[ed] [Mr. Sharpe's] military background" in making recommendations. And he was permitted to ask SAIC Sherman his "opinion of reservists." But when Mr. Sharpe sought to question SAIC Sherman—ASAIC Tomaski's direct supervisor and a recipient of the Tomaski email—about the email, the MSPB AJ sustained the government's objection to the questioning, stating it "[did not] see any relevance" to the testimony.

In her scholarly opinion, Judge Moore wrote:

The MSPB found that Mr. Sharpe failed to show his reservist status was a substantial or motivating factor in his non-selection for the GS-14 positions. It "consider[ed] whether there was any hostility by [SAIC] Sherman towards [Mr. Sharpe's] or others' military or USERRA activity," but found Mr. Sharpe had not shown any such hostility. On appeal, Mr. Sharpe argues that the MSPB's findings were tainted by its exclusion of the Tomaski email and SAIC Sherman's testimony. We agree with Mr. Sharpe that SAIC Sherman's response to the Tomaski email was relevant, and that SAIC Sherman should have been allowed to discuss the Tomaski email in order to lay foundation for that relevant testimony.

We review the MSPB's evidentiary rulings for abuse of discretion. *Curtin v. Office of Personnel Management*, 846 F.2d 1373, 1379 (Fed. Cir. 1988). It can be an abuse of discretion to exclude relevant evidence on an issue for which a party bears the burden of proof. *Whitmore v. Department of Labor*, 680 F.3d 1353, 1368-69 (Fed. Cir. 2012). Here, the MSPB abused its discretion by excluding the Tomaski email and preventing Mr. Sharpe from questioning SAIC Sherman about it because this evidence is relevant to Mr. Sharpe's burden under *Sheehan*.

Mr. Sharpe alleges that his non-selection for promotion to a GS-14 position resulted from SAIC Sherman's hostility towards reservists. He argues that because SAIC Sherman was hostile towards reservists, he never recommended Mr. Sharpe as his first-ranked agent; and because Mr. Sharpe was never first ranked, he was never selected by the Career Board for promotion. The Tomaski email and SAIC Sherman's testimony are relevant to this allegation.

ASAIC Tomaski sent the Tomaski email to Mr. Sorrells, copying SAIC Sherman, within days of Mr. Sorrells' USERRA complaint. It had the subject line "You are a coward..." and stated, in full, "I do not know how to phrase it any other way.. Do NOT ever contact me again." J.A. 1793. Mr. Sorrells, like Mr. Sharpe, was a reservist working in the SDFD under SAIC Sherman. ASAIC Tomaski reported directly to SAIC Sherman.

Had the Tomaski email been admitted, and had Mr. Sharpe been permitted to question SAIC Sherman about it, Mr. Sharpe could have explored whether SAIC Sherman is hostile towards reservists. He could have asked SAIC Sherman, for example, whether he understood the email to refer to Mr. Sorrells' USERRA claim, what his reaction was to the sentiments expressed by ASAIC Tomaski, what action (if any) he took in response, or whether ASAIC Tomaski had ever copied SAIC Sherman on similar emails. Through the Tomaski email and SAIC Sherman's testimony, Mr. Sharpe could have explored whether SAIC Sherman is hostile towards reservists. By excluding this evidence, the MSPB cut off that exploration.

We recognize, as the MSPB observed, that the Tomaski email "didn't even reference Mr. Sharpe." J.A. 131. But it *does* reference Mr. Sorrells, an agent who, like Mr. Sharpe, worked in the SDFD under SAIC Sherman; like Mr. Sharpe, was a reservist; and, like Mr. Sharpe, filed a USERRA claim naming SAIC Sherman. *Sorrells*, SF-4324-15-0584-1-2, 2016 MSPB LEXIS 5729, at 2-3, 44. The MSPB "consider[ed] whether there was hostility by Sherman *towards . . . others' military or USERRA activity*." J.A. 32 (emphasis added). Evidence of the Tomaski email and of Mr. Sherman's response to it is relevant to SAIC Sherman's potential hostility towards others' military or USERRA activity.

"[D]iscrimination is seldom open or notorious," *Sheehan*, 240 F.3d at 1014, and "employers rarely concede an improper motivation for their employment actions," *McMillan v. Department of Justice*, 812 F.3d 1364, 1372 (Fed. Cir. 2016).⁹ Rather, discrimination tends to be "inferred" from evidence of "hostility" or "disparate treatment of certain employees compared to other employees with similar work records or offenses." *Sheehan*, 240 F.3d at 1014. Because Mr. Sharpe sought to introduce the Tomaski email and question SAIC Sherman about it to support an inference that his non-selections resulted from SAIC Sherman's hostility towards reservists, the MSPB abused its discretion in excluding it as irrelevant.¹⁰

Judge Moore ended her opinion as follows:

CONCLUSION

⁹ I discuss *McMillan* in detail in Law Review 16013 (March 2016).

¹⁰ *Sharpe*, 916 F.3d at 1379-80.

Because we hold that the MSPB abused its discretion by excluding the Tomaski email and SAIC Sherman's testimony, we vacate the MSPB's decision and remand for further proceedings. In light of the remand, we need not reach Mr. Sharpe's other evidentiary arguments on this appeal; the MSPB should consider all the evidence in reevaluating the USERRA claim once it conducts appropriate proceedings in light of our ruling today.

VACATED AND REMANDED

Now, this case will go back to AJ Ribas, or preferably a different AJ, to conduct a new hearing and to admit all relevant evidence. If Sharpe wins on remand, DOJ will likely appeal to the MSPB itself, and the case will probably go into a years-long limbo until there are at least two appointed and confirmed MSPB members and they can work their way through the years-long backlog and start reviewing new cases.¹¹

The Federal Circuit has a long history of reversing the MSPB when the Board fails to protect the rights of those who are serving or have served our country in uniform. Please see Law Reviews 189 (2004), 0614 (2006), 0726 (May 2007), 0729 (June 2007), 0752 (October 2007), 0755 (October 2007), 1103 (January 2011), 1128 (March 2011), 1163 (June 2011), 13021 (January 2013), 14004 (January 2014), 15064 (July 2015), 16012 (March 2016), 17076 (August 2017), and 18030 (March 2018). *Sharpe* is another fine addition to this distinguished list.

Kevin Sharpe is very ably represented by attorney Kevin Edward Byrnes of the law firm FH&H PLLC of Tysons, Virginia. We will keep the readers informed of developments in this interesting and important case.

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This article is one of 1800-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to

¹¹ As I explained in Law Review 19041 (April 2019), President Trump nominated a Chairman and Vice Chairman (both Republicans) and a Member (a Democrat). In February 2019, the Senate Homeland Security and Government Affairs Committee approved the nomination of the Chairman and the Member, but the nomination of the Vice Chairman was withdrawn. President Trump has not yet nominated a substitute candidate for the Vice Chairman position. The full Senate probably will not address the nominations until there is a slate of three to be confirmed. In late April, President Trump announced his intent to nominate a specific person for the Vice Chairman position. I hope that the President will quickly nominate that person and that the Senate will quickly confirm the three nominees. We will keep the readers informed of developments.

advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's national defense needs.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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